Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELLIS T. MCCOY,

Appellant,

—v.—

WISCONSIN COURT OF APPEALS, DISTRICT I,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ACLU OF WISCONSIN AS AMICI CURIAE IN SUPPORT OF APPELLANT

KIM ROBERT FAWCETT
Counsel of Record
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
1625 K Street, N.W.
Eighth Floor
Washington, D.C. 20006
(202) 452-0620

Attorneys for Amici Curiae

Of Counsel:

JOHN A. POWELL
STEVEN R. SHAPIRO
LARRY W. YACKLE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT..... 2

STATEMENT OF THE CASE..... 7

ARGUMENT:

I. THE WISCONSIN DISCUSSION RULE CONFLICTS WITH COUNSEL'S CONSTITUTIONAL ROLE AS AN ADVOCATE..... 13

II. THE WISCONSIN DISCUSSION RULE UPSETS THE BALANCE BETWEEN COUNSEL'S ROLE AS ADVOCATE AND COUNSEL'S PROFESSIONAL RESPONSIBILITY TO FOREGO FRIVOLOUS CLAIMS..... 19

CONCLUSION..... 29

TABLE OF AUTHORITIES

CONSTITUTION

U.S. Const., Am. XIV 13,30

STATUTES

28 U.S.C. 1915(d) 22

COURT RULES

Wisconsin Rule 809.32(1) Stats. (1983-84). . . 7,8,9,10,30

CASES

Anders v. California, 386 U.S. 738 (1967). . . . 4, Passim

Commonwealth v. McClendon, 495 Pa. 467; 434 A.2d 1195 (1981) 23

Coppedge v. United States, 369 U.S. 438 (1962). . 22,29

Douglas v. California, 372 U.S. 353 (1963) 14,25,28

Ellis v. United States, 356 U.S. 674 (1958) 20,25

Entsminger v. Iowa, 386 U.S. 748 (1967) 19,25

LaFosse v. Walters, 585 F. Supp. 1209, 1213, n. 6 (S.D. N.Y. 1984) 16

Macon v. Lash, 458 F.2d 942 (CA 7 1972) 27

Nickols v. Gagnon, 454 F.2d 467 (CA 7 1971), cert. denied, 408 U.S. 925 (1972) 27

Pennsylvania v. Finley, 481 U.S. ___ (1987). 14

Polk County v. Dodson, 454 U.S. 312 (1981) . . . 19,18,30

State of Wisconsin ex rel. Ellis T. McCoy v. Wisconsin Court of Appeals, Division I, 137 Wis. 2d 90; 403 N.W.2d 449 (1987) . . 12,15,29

Swenson v. Bosler, 386 U.S. 258 (1967). 15

United States v. Camodeo, 383 F.2d 770 (1967) 27

United States v. Cronic, 466 U.S. 648, n. 19 (1984) . . 27

United States v. MacCollum, 426 U.S. 317 (1976) . . . 22

No. 87-5002

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ELLIS T. McCOY,

Appellant,

vs.

WISCONSIN COURT OF APPEALS, DISTRICT I,

Appellee,

ON APPEAL

FROM THE SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ACLU OF WISCONSIN, AS AMICI CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

The National Legal Aid and Defender Association (hereinafter NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, the NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing trial and appellate representation to indigents arrested on or convicted of criminal charges. The membership of the NLADA, therefore, comprises most public defender offices and legal services agencies around the nation,

as well assigned counsel plans and private practitioners.

NLADA members and member offices represent indigent appellants in first criminal appeals of right in appellate courts throughout the nation. The NLADA advocates effective assistance of counsel on appeal and is vitally concerned that every indigent appellant receives the same.

The American Civil Liberties Union (hereinafter ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The ACLU of Wisconsin is one of its affiliates. The ACLU and its affiliates are particularly committed to preserving the right to effective assistance of counsel as required by the

Constitution. The ACLU has been involved in many cases before this Court, as well as in courts throughout the nation, as an advocate for the right to effective assistance of counsel.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae in support of Appellant.

We believe Wisconsin's "discussion" rule is unconstitutional. It requires counsel to brief the appeal against his client or to act as amicus curiae rather than as a vigorous advocate. We believe vigorous advocacy requires that counsel exercise professional independence and act with undivided loyalty on behalf of the client. We believe the "discussion" rule is inconsistent with "the constitutional requirement of substantial equality and

fair process". Anders v. California, 386 U.S. 738, 744 (1967).

We further believe that appointed counsel may reconcile any perceived conflict between ethical standards and the constitutional obligation of vigorous advocacy by faithfully pursuing the duty to advocate the client's interest in continuing his or her appeal to final submission on full briefs and oral argument. In our view, this is consistent with counsel's professional obligation to make a suggestion that the reviewing court make a finding regarding frivolity. It is vitally important to both client and counsel that the suggestion of frivolity be resolved. If the appeal is not clearly frivolous, counsel may proceed undeterred by fear of sanctions that might otherwise be imposed should the appeal be actually

frivolous and the suggestion of frivolity not be made. Clarifying the issue of apparent frivolity, then, more nearly enhances than impairs counsel's ultimate ability to be effective on appeal, as required by the Constitution.

This case poses a fundamental question regarding the advocacy required when counsel suggests an appeal is frivolous. That is, whether a state procedural rule compelling counsel to discuss the demerits of his client's appeal is consistent with the Constitution. Amici respectfully argue that it is not, and that Wisconsin's "discussion" rule is unconstitutional.

STATEMENT OF THE CASE

On December 2, 1983, Appellant Ellis T. McCoy was convicted on two felony counts in Milwaukee County Circuit Court. He appealed of right. His court-appointed counsel, Louis B. Butler Jr., began preparation of the appeal with a view toward filing an advocate's brief in the Wisconsin Court of Appeals, District I.[1/] After doing research in preparation for filing that brief, Butler "concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1)." See Jurisdictional Statement, at 7.

1/ The appeal being denominated State v. Ellis T. McCoy, No. 84-929-CR-NM.

Butler then faced Wisconsin Rule 809.32(1) Stats. (1983-84), requiring that he "file with the court of appeals . . . a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit."[2/] He discussed the matter twice by telephone with Mr. McCoy and presented McCoy with three options: voluntary dismissal, proceeding pro se, or

---

2/ 809.32 (1983-84) Rule (No merit reports) (1) If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without an arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

proceeding under the "no merit" rule. Mr. McCoy elected the third option.

Butler prepared a "no merit" brief raising four issues, referred to the transcript to demonstrate the factual or procedural grounds underlying them, cited authority defining the legal principles upon which the issues were based, and asserted the relief which would follow should the issues prevail on their respective merit. He also moved for permission to withdraw.

Butler did not, however, discuss why the issues he raised lacked merit. Instead, he expressly challenged the constitutionality of the requirement that he include such a discussion in the "no merit" brief. Butler filed a motion in the Wisconsin Court of Appeals seeking a determination of the constitutionality of

Rule 809.32(1) and a clarification of the scope of his representation, asserting that compliance with the "discussion" rule would be "directly contrary to Anders" and "unconstitutional." Further, he asserted that he could not "ethically take a position which would argue against his client or act as amicus curiae." See No Merit Brief of Defendant-Appellant.

The Wisconsin Court of Appeals, District I, denied that motion on the ground that a "no merit" brief had not yet been filed and no justiciable controversy existed. When Butler filed his "no merit" brief without a "discussion" of the demerits of his client's claims, the Court of Appeals struck the brief for noncompliance with Rule 809.32(1). Butler then petitioned the Wisconsin Supreme Court for review, seeking resolution of

the constitutional question and a declaration of Mr. McCoy's rights.

On May 8, 1985, the Wisconsin Supreme Court denied review on the ground that there was an adequate remedy at law in the Court of Appeals. After unsuccessfully renewing the motion to determine the constitutional question in the Court of Appeals, Butler filed an original action for a declaratory judgment in the Wisconsin Supreme Court. Review was granted on March 27, 1986. See Jurisdictional Statement, at 2.

On April 9, 1987, the Wisconsin Supreme Court held that the "discussion" rule was constitutional under Anders v. California, supra.[3/] Although the court acknowledged

---

3/ See State of Wisconsin ex rel. Ellis T. McCoy v. Wisconsin Court of Appeals, Division I, 137 Wis. 2d 90; 403 N.W.2d 449 (1987).

that the "discussion" rule went beyond Anders,[4/] the court denied that the rule required counsel to brief the case against his client. Among other things, according to the court, the "discussion" rule "serves as a significant administrative aid to the reviewing court." State ex rel. McCoy, supra, n.3, 137 Wis. 2d at 103.

Appellant appealed to this Court. Probable jurisdiction was noted on October 5, 1987. ___ U.S. ___; 108 S.Ct. 63.

4/ The Court said: "The Wisconsin procedure goes beyond Anders and requires the attorney to file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicting why the appeal lacks merit." State ex rel. McCoy, supra, n.3, 137 Wis. 2d at 95.

I. THE WISCONSIN DISCUSSION RULE CONFLICTS WITH COUNSEL'S CONSTITUTIONAL ROLE AS AN ADVOCATE.

Amici curiae believe that the "no merit" brief filed by attorney Louis B. Butler, Jr., satisfied the requirements of Anders v. California, 386 U.S. 378 (1967). Butler made a partisan presentation of four issues and, by moving to withdraw, questioned whether the appeal was frivolous. His brief provided the appellate court with sufficient basis to decide whether the issues raised were, indeed, frivolous. Requiring counsel to discuss or state why the issues lack merit asks him to brief the appeal against his client, or perform as amicus curiae. We believe Wisconsin's "discussion" rule is unconstitutional under the Fourteenth Amendment of the United States Constitution.

The right to counsel on first appeal, recognized in Douglas v. California, 372 U.S. 353 (1963), requires counsel to examine the record, research the law, and marshall the arguments on behalf of the client. If, after conscientious evaluation of the record, counsel concludes that all issues are wholly frivolous counsel must file a brief referring to any arguable support in the record and give notice to the client. Anders v. California, 386 U.S. at 744. See also Pennsylvania v. Finley, 481 U.S. ___ (1987). This briefing requirement does "not force appointed counsel to brief his case against his client" but merely affords the client "that advocacy which a nonindigent defendant is able to obtain." Anders, 386 U.S. at 745. Counsel should not function as a friend of the court. "The consitutional requirement of

substantial equality and fair process can only be attained where counsel acts in behalf of his client, as opposed to that of amicus curiae." Id., at 744.

When counsel identifies "points" or "arguments" which appear to support the appeal, but which counsel deems to be frivolous, the brief must advance them, show what support they may have in the record and provide the court with authority defining the legal principles on which they are based.[5/] The Wisconsin rule requires counsel to do more -- to provide "a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same

---

5/ See Swenson v. Bosler, 386 U.S. 258, 259 (1967).

result." State ex rel. McCoy, supra, n. 3, 137 Wis. 2d at 100. Counsel must advance, therefore, matters which do not support, but oppose, his client's interest in prevailing on the issue of frivolity.[6/] Moreover, the "discussion" rule requires counsel to advance "any" authorities that militate against his client's points. Counsel must, accordingly, research the case from the state's perspective. Such a responsibility conflicts with the well-settled obligation to serve as the client's advocate. Counsel should research the case with a view toward overcoming unfavorable authority that may

---

6/ See LaFosse v. Walters, 585 F. Supp. 1209, 1213, n. 6 (S.D. N.Y. 1984) [Anders not satisfied where counsel's brief "was not submitted in an attempt to support his client's appeal but rather as a motion to withdraw"; held -- motion to withdraw erroneously granted].

be discovered. Where counsel researches the law as an advocate, and discovers both favorable and unfavorable authority, counsel should not cite unfavorable authority unless it is strictly necessary to do so to avoid misrepresentation.

Regarding references to the record, Anders requires counsel to refer "to anything in the record that might arguably support the appeal." This directive was calculated to prevent the reviewing court from having to sift through "only the cold record ... without the help of an advocate." Id., 386 U.S. at 744, 745. Anders required counsel to identify record support for the points advanced in order to avoid conclusory suggestions of frivolity, thus permitting the reviewing court to evaluate the factual basis of the claims advanced.

The Wisconsin "discussion" rule, by contrast, seeks to impose divided loyalties upon counsel, recruiting the individual's champion to "the mission that the State ... attempts to achieve." Polk County v. Dodson, 454 U.S. 312, 320 (1981). The "discussion" required of counsel serves only the state's convenience, forcing lawyers representing individual clients to do the work constitutionally assigned to states' attorneys on appeal.

II. THE WISCONSIN DISCUSSION RULE UPSETS THE BALANCE BETWEEN COUNSEL'S ROLE AS ADVOCATE AND COUNSEL'S PROFESSIONAL RESPONSIBILITY TO FOREGO FRIVOLOUS CLAIMS.

The ethical problems appointed appellate counsel confront are well-known. On the one hand, counsel must be an active advocate. Entsminger v. Iowa, 386 U.S. 748 (1967). On the other hand, "the canons of professional ethics impose limits on permissible advocacy." Polk County v. Dodson, 454 U.S. 312, 323 (1981).

This Court recognized this tension in Anders, supra. There, counsel filed with the reviewing court only a letter asserting that there was no merit in the appeal; there was no assertion that the appeal was wholly frivolous. This "bare conclusion" was based on counsel's reading

of the transcript and communication with his client. Although this Court did not specifically state that counsel had conscientiously investigated the appeal, it appears to have so assumed.[7/] The Court determined, however, that the California Supreme Court dismissed Anders' habeas corpus application without giving a reason for its decision. Thus the Court was unable to say that any state court had made a determination of frivolity or that counsel had acted "in any greater capacity than merely as amicus curiae." See Ellis v. United States, 356 U.S. 674 (1958). Anders, supra, at 743. The conclusory

---

7/ "We are here concerned with the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." Anders v. California, 386 U.S. at 739.

nature of counsel's presentation before the California courts, and the lack of any judicial finding of frivolity, generated this Court's holding: "California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." Anders, supra, at 743.

The proper procedure, articulated in Anders, respects both the client's interest in effective advocacy in order that the appeal is dismissed only upon a judicial determination of frivolity and counsel's professional obligation to the court. In every case, counsel must file a brief identifying issues apparently available to the client and referring "to anything in the record that might arguably

support the appeal." Id., 744. Counsel must render to his or her client what may be the final service as advocate -- the presentation of arguments necessary to aid the reviewing court in determining the inaccuracy of counsel's suggestion that the appeal may be frivolous. If this procedural safeguard works as intended by Anders, the reviewing court will check ill-conceived conclusions by counsel, or conversely, it will independently verify the suggestion of frivolity through its own review, assuring that counsel has not overlooked a rational argument on the facts or law.[8/]

8/ See Coppedge v. United States, 369 U.S. 438, 448 (1962) [indigent federal prisoner must have appeal heard "if he makes a rational argument on the law or facts"; interpreting 28 U.S.C. 1915(d) and standard of frivolity contained therein. See also United States v. MacCollum, 426 U.S. 317 (1976).

Anders contemplates that the reviewing court not be left with "only the cold record" to review "without the help of an advocate," Anders, at 745. The reviewing court needs the assistance of counsel to argue for the continued viability of the appeal and against a finding of frivolity.[9/]

The purpose of the exercise is not to persuade the court that counsel should be allowed to withdraw -- there is no right of counsel to withdraw.[10/] Rather, the purpose of the procedure is (1) to allow the court, and not counsel, to decide the

---

9/ Of course, the focus of the independent judicial review is exclusively on the issue of frivolity; the court should not reach the merits of any claims found not clearly frivolous.

10/ But see Commonwealth v. McClendon, 495 Pa. 467; 434 A.2d 1195 (1981).

issue of frivolity; (2) to protect the client's interest in continuing the appeal on full briefs and oral argument; while (3) protecting counsel from any subsequent sanctions for abusing the appellate process (were withdrawal not sought), by permitting notice to the court of counsel's suggestion of frivolity.

Under the Anders procedure, counsel is aided by both the opportunity to candidly communicate to the court a suggestion of frivolity and by the privilege of seeking guidance from the court on whether to proceed and how to do so. The client is protected by the court's independent review of the record to assure that the appeal is not clearly frivolous and that no rational claim of error has been overlooked. The client has an active advocate on the issue of nonfrivolity, and

the benefit of a burden of persuasion which does not require showing the likelihood of prevailing on the merits, but only that the appeal is not clearly frivolous. Moreover, the client has notice and opportunity to be heard on the question of frivolity. In short, the client has a "real chance ... of showing that the appeal has hidden merit." Douglas v. California, 372 U.S. at 356, and still enjoys representation by counsel functioning "in the active role of an advocate, as opposed to that of amicus curiae". Entsminger v. Iowa, 386 U.S. at 751 (1967); Ellis v. United States, 356 U.S. 674, 675 (1958).

Thus Anders provides that an attorney may suggest frivolity, seek guidance from the court, and advocate for a finding that the appeal is not clearly frivolous.

Thereafter, if the appeal proceeds to full briefing and oral argument on the merits, counsel is immune from any qualms prompted by his earlier doubts about the appeal's possible lack of merit because the appeal has been judicially certified as arguably meritorious.

In the case at bar Mr. Butler's good faith attempt to act as an advocate on behalf of his client is hindered by a state procedure which fundamentally warps his responsibilities. Counsel is effectively required, under Wisconsin's "discussion" rule, to abandon advocacy in his presentation to the court.

Anders, by contrast, requires a partisan presentation to the reviewing court. The duty of independent judicial review is exceedingly important, especially where counsel asserts that

there is nothing to advocate.[11/] That duty does not simply disappear once

---

11/ The Constitution does not require that counsel do what is impossible. United States v. Cronic, 466 U.S. 648, 656, n. 19 (1984), citing Nickols v. Gagnon, 454 F.2d 467 (CA 7 1971), cert. denied, 408 U.S. 925 (1972). See also United States v. Camodeo, 383 F.2d 770, 772 (1967). Where courts are confronted with a brief asserting the lack of any irregularities which could be possible issues, the value of independent judicial review is at its zenith. The danger is that counsel may be inexperienced or untrained, or both, and will have missed a colorable issue. See Macon v. Lash, 458 F.2d 942, 946 (CA 7 1972) [inexperienced counsel]; and Nickols v. Gagnon, supra, 469 [analysis by a trained advocate]. While even experienced, trained counsel are not immune from such failure, even though they may rarely commit it, the court cannot rely on counsel's presentation alone to define the universe of possible claims that may arguably support a given appeal. However problematic, the possibility of the proverbial perfect trial must be weighed against the possibility of undiscovered issues of merit, overlooked by untrained, often young and inexperienced lawyers. The only real safeguard that exists under present law is the duty of truly

(Footnote Continued on Next Page)

counsel has presented issues rationally framed and accompanied by legal authority defining the underlying principles of law and "ready references" to the record facts supporting them. The court still must review the appeal for "hidden merit" which may exist quite apart from the points framed by counsel.[12/]

Hostility to the duty of independent judicial review may be understandable where counsel too quickly resorts to the the Anders procedure, thereby imposing upon the court inappropriate motions to withdraw which burden the court's already busy docket. Yet the remedy is to discourage motions to withdraw except

---

(Footnote Continued From Previous Page)

independent judicial review of the appeal.

12/ Douglas v. California, 372 U.S. 353, 356, 358 (1963).

where the appeal is clearly frivolous. Otherwise, indigent appeals will "be used as a convenient valve for reducing the pressures of work on the courts." Coppedge v. United States, 369 U.S. 438, 459 (1962).

The Wisconsin Supreme Court held that there is a co-equal duty placed upon counsel to aid the court with a balanced evaluation of the appeal, and suggested that that requirement is neither sanctioned nor proscribed by Anders. State ex rel. McCoy, supra, n. 3, 137 Wis. 2d at 97, 98. This is a fundamental misconception.

CONCLUSION

Wisconsin's "discussion" rule cannot be reconciled with the goal of protecting the client's interest in continuing the

appeal. The "discussion" rule, in fact, conflicts with Anders in the most fundamental manner by redefining and limiting the principle of advocacy. If, by hypothesis, the "professional obligation to withdraw from frivolous appeals ... [is] be[ing] invoked with disproportionate frequency in cases involving indigent prisoners" Polk County, supra, 454 U.S. at 324, wide-spread adoption of state procedural rules patterned on Wisconsin's "discussion" rule will exacerbate the problems already facing ethical counsel. Increased mistrust and suspicion will surface and corrode the relationship between appointed counsel and indigent client, and the entire system of partisan advocacy will retrogress. The Wisconsin "discussion" rule, Rule 809.32(1), plainly violates the Fourteenth Amendment.

Respectfully submitted,

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
1625 K Street N. W.
Eighth Floor
Washington, D.C. 20006
(202) 452-0620

BY: KIM ROBERT FAWCETT
Counsel of Record

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

AMERICAN CIVIL LIBERTIES
UNION OF WISCONSIN

By: JOHN A. POWELL
STEVEN R. SHAPIRO
LARRY W. YACKLE

Dated: November 16, 1987